Appendix A: Direct Appeal Denied, 10/15/02 (Comm. v. Lynch, 39 Va. App. 89, 370 S.E.2d 871)

PUBLISHED

COURT OF APPEALS OF VIRGINIA

Present: Judges Annunziata, Bumgardner and Frank Argued at Salem, Virginia

CLARENCE JAY LYNCH

v. Record No. 1874-01-3

COMMONWEALTH OF VIRGINIA

OPINION BY JUDGE RUDOLPH BUMGARDNER III OCTOBER 15, 2002

FROM THE CIRCUIT COURT OF THE CITY OF ROANOKE
Robert P. Doherty, Jr., Judge

Melissa W. Friedman (Anthony F. Anderson, on brief), for appellant.

Marla Graff Decker, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

A jury convicted Clarence Jay Lynch of manufacturing marijuana not for personal use. He assigns two errors: (1) the admission of evidence seized pursuant to a search warrant, and (2) the failure of the trial judge to recuse himself.

Finding no error, we affirm.

On May 17, 1999, a concerned citizen notified police the defendant was growing marijuana in his residence at 925 Westside Boulevard N.W. The citizen had seen 30 to 50 marijuana plants and grow lights in the residence as recently as "06[sic]0199." On July 28, 1999, a second concerned citizen notified police the defendant was growing and selling marijuana from his residence. He reported the defendant "had numerous firearms in the residence and threatened to use them if he came in contact with the police." The police verified the defendant's identity and address from the city directory and Department of Motor Vehicles records. Police conducted a power consumption analysis from the electric utility's records for the defendant's residence. Over the previous six-month period, the defendant consumed three times more power than neighbors, who resided in similar houses. The defendant's power consumption coincided with the cultivating and harvesting cycle of marijuana.

Additionally, the police twice used a thermal imaging device and detected an extreme heat source at the rear of the residence.

The investigating detective recited those details in an affidavit for a search warrant of the defendant's residence that he prepared on September 9, 1999. A magistrate issued the warrant that evening, and police officers executed it shortly thereafter. The defendant moved to suppress the marijuana plants, related evidence, and incriminating statements obtained during the search.

The trial court held the evidence was admissible under the good faith exception of United States v. Leon, 468 U.S. 897 (1984), even assuming the affidavit was deficient or the warrant was invalid. The trial judge ruled: the magistrate did not abandon his judicial role; the police officers were not dishonest or reckless in preparing the affidavit and did not mislead the magistrate; the warrant is not so lacking in

probable cause or the required information as to render belief in its existence unreasonable; and the warrant was not so facially deficient that the executing officers could not reasonably assume it was valid.

On appeal, the defendant contends the trial court erred in applying the good faith exception to the exclusionary rule. He argues the thermal imaging surveillance of his residence was unconstitutional[1] and the results must be excised when assessing the validity of the search. He concludes that without the results of the thermal imaging the affidavit was facially deficient and reliance on it was unreasonable.

As did the trial court, we do not address the validity of the search warrant because the good faith exception applies to the facts of this case. The good faith exception is not available in four situations:

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[1] Kyllo v. United States, 533 U.S. 27 (2001), ruled thermal imagery was an unconstitutional search. The Supreme Court rendered its decision after the defendant's suppression hearing and trial, but before sentencing.

> (1) [W]here the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false, (2) the issuing magistrate totally abandoned his judicial role, (3) the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable or (4) where the warrant was so facially deficient that an executing officer could not reasonably have assumed it was valid.

Adkins v. Commonwealth, 9 Va. App. 462, 464, 389 S.E.2d 179, 180 (1990) (citing Leon, 468 U.S. at 923). Only the third or fourth exceptions could apply in this case, but neither does.

The affidavit stated that two concerned citizens observed the marijuana plants inside the defendant's home. The police corroborated that the defendant existed and resided at the address provided. A detailed power consumption analysis of the residence revealed the defendant used an unusual amount of power, which correlated with the marijuana cultivation cycle. The investigation tended to corroborate the information provided by the citizen informants. Even

excluding the information derived from thermal imaging, the affidavit did not lack indicia of probable cause. The third exception to the good faith doctrine does not apply to this case.

At the time the magistrate issued the warrant, the Supreme Court had not decided Kyllo v. United States, 533 U.S. 27 (2001). Indeed, every United States Circuit Court that had addressed the issue had ruled that the use of the thermal imagery was permissible. Id. at 46 n.4 (Stevens, J., dissenting). The magistrate and officers were entitled to rely on the results of that surveillance technique when determining probable cause for the search warrant. They adhered to established law, and requiring them to anticipate the constitutional standard announced in Kyllo is not reasonable.

When the officers conducted their search, they acted under authority of an apparently valid warrant. "[A]n officer cannot

be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." Leon, 468 U.S. at 921. Though partially based on information derived from thermal imaging, the warrant was not so facially deficient that the officers were unreasonable in assuming it was valid. The fourth exception to the good faith doctrine does not apply to this case.

"The purpose of the exclusionary rule historically was to deter police misconduct rather than to punish the errors of magistrates. This deterrent is absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant." Derr v. Commonwealth, 242 Va. 413, 422, 410 S.E.2d 662, 667 (1991) (citation omitted). None of the evils sought to be avoided by the exclusionary rule are present in this case. The trial court did not err in denying the defendant's motion to suppress the evidence obtained from

execution of this search warrant.

Next, we consider whether the trial judge erred by refusing to recuse himself. Judge Apgar presided at the suppression hearing. By the time the trial began, he had been assigned to a different court within the circuit. Judge Apgar denied a motion to continue the case until he could preside. Judge Doherty conducted the trial during which the defendant represented himself. Judge Doherty declared a mistrial and found the defendant in contempt for misconduct that disrupted his trial. Judge Doherty denied a motion to have Judge Apgar preside at the retrial.

The defendant contends Code § 17.1-503[2] mandates

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[2] Code § 17.1-503 provides in part:
No rule shall hereafter be promulgated which would avoid or preclude the judge before whom an accused is arraigned in criminal cases from hearing all aspects of the case on its merits, or to avoid or preclude any judge in any case who has heard any part of the case on its merits, from hearing the case to its conclusion. However, another judge may hear portions of a case where a judge is required to disqualify himself, in cases in which a mistrial is declared, or in cases in which have been reversed on appeal, or in the event of sickness, disability or vacation of the judge.

that the judge who hears a preliminary matter hear the entire case. The statute forbids a rule of the Supreme Court that would preclude a judge from hearing a case to its conclusion. It simply does not read as the defendant contends.

The defendant contends the trial judge had a conflict of interest because he was a former law partner of the defendant's first attorney whom the defendant discharged. He maintains the judge was biased because he held the defendant in contempt during the first trial. After a full hearing on the motion to recuse, the trial judge stated he did not have "any sort of conflict" and denied the motion.

Whether a judge should recuse in a given case rests within the exercise of reasonable discretion. Deahl v. Winchester Dep't Soc. Servs., 224 Va. 664, 672, 299 S.E.2d 863, 867 (19B3) . The judge's decision will not be reversed absent a showing that he abused his discretion. In Stockton v. Commonwealth, 227 Va. 124, 141, 314 S.E.2d 371, 382 (1984), the trial judge did not abuse his discretion in not

recusing after the defendant had cursed him during the previous trial. In Justus v. Commonwealth, 222 Va. 667, 673, 283 S.E.2d 905, 908 (1981), the trial judge did not abuse his discretion when he retried the defendant after his first capital murder conviction was reversed.

The defendant provided no support for his claim of conflict and bias, and none appears from the record. The record provides no indication that the trial judge abused his discretion in not recusing himself. The trial court did not err in denying the motion to do so.

For the reasons stated, we affirm the conviction.

Affirmed.

Appendix B: Virginia Supreme Court, Denial of Direct Appeal 03/05/03

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on

Wednesday *the* 5th *day of* March, 2003.

Clarence Jay Lynch
Appellant'

Against: Record No. 022611
Court of appeals No. 1874-01-3

Commonwealth of Virginia,
Appellee.

From the court of appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach
Clerk

By: s Shaun L. Ully
Deputy Clerk

Appendix C: First § 2254 Petition Denied 07/22/03

ENTERED 7/22/03

CLERKS OFFICE U.S. Dist. Court
AT ROANOKE, VA
FILED
JULY 22, 2003
JOHN F. CORCORAN, CLERK
BY: s_____

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION.

CLARENCE JAY LYNCH, Petitioner	Case No. 7:03cv00230
v.	ORDER
GEORGE M. McMILLAN, Respondent,	By: Jackson L. Kiser Senior United States District Judge

In this habeas corpus action, respondent McMillian has moved [No. 3-1] to dismiss the petition. For the reasons stated in the accompanying memorandum opinion, the respondent's motion is GRANTED and this case is DISMISSED WITH PREJUDICE. Any other pending

motions are dismissed as moot. The Clerk is directed to strike this case from the active docket.

The Clerk shall send a copy of this order and memorandum opinion to counsel of record.

Entered this 22 day of July, 2003.

s_____
Senior United States District Judge

A TRUE COPY TESTE
JOHN F. CORCORAN, CLERK

BY: s_____
DEPUTY CLERK

Appendix D: **Appeal of § 2254 Denial Refused by Fourth Circuit, 01/12/04**

RECEIVED
JAN 12, 2004

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-7270

CLARENCE JAY LYNCH
Petitioner- Appellant

versus

GEORGE M. McMILLAN,
Sheriff, Roanoke City,
Respondent – Appellee

Submitted: December 19, 2003 Decided: January 9, 2004

Before WIDNER, WILKINSON, and DUNCAN, Circuit Judges

Dismissed by unpublished per curium opinion

John Emmette Pilgreen, IV, Harvey Lutkins, LUTINS & PILGREEN, P.C., Roanoke, Virginia, for Appellant. Amy L. Marshall, OFFICE OF THE ATORNEY GENERAL OF BIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Clarence Jay Lynch seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C. § 2254 (2000). The order is appealable only if a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurist would find that his constitutional claims are debatable and that any dispositive procedural ruling by the

district court are also debatable of wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th conclude that Lynch has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

Appendix E: Part I - State Court Denies Habeas Corpus Petition 09/17/04

VIRGINIA

IN THE CIRCUIT COURT FOR THE
CITY OF ROANOKE

CLARENCE JAY LYNCH #319339
Petitioner

v. Case No: CL04000604

GENE JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF
CORRECTIONS
Respondent

ORDER

Upon mature consideration of the pleadings and exhibits, and a review of the record in the criminal case of Commonwealth v. Clarence Jay Lynch, which is hereby made a part of the record in this habeas corpus matter, the Court is on the opinion that the petitioner is not entitled to the relief sought.

Specifically, the court finds that all of petitioner's claims attacking his conviction for the manufacture of marijuana not

for personal use are barred by the statute of limitations as provided by Code § 8.01-654(A)(2). Petitioner had until March 5, 2004 (one-year form conclusion of his direct appeal to file his petition. Lynch did not file his petition until June 7, 2004, which was months beyond the expiration of the statute of limitations. Further, there is nothing in the language of code § 8.01-654(A)(@) which permits tolling during the pendence of his general habeas proceeding See Duncan v. Walker, 533 U.S. 167 (2001).

It is, therefore, ADJUDGED and ORDERED that all of petitioner's claims are hereby denied and dismissed as untimely, to which action of this Court the petitioner's exceptions are noted.

IT IS FURTHER hereby ordered that the Clerk serve my mail certified copies of this Order on the petitioner and on Amy L. Marshall, Assistant Attorney General, counsel for respondent.

Enter this 17th day of September 2004

/s/ Robert P. Doherty Jr.
Judge

I ask for this:

/s/ Amy L. Marshall
Amy L. Marshall
Assistant Attorney General
Office of the Attorney General
Counsel for Respondent

A COPY TESTE BRENDA S. HAMILTON,
CLERK
By /s/ _____ Deputy Clerk

Appendix E: Part II - Revision Order 09/21/04

VIRGINIA

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

CLARENCE JAY LYNCH, PETITIONER	ORDER
v.	CL04-604R
GENE JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS RESPONDENT	

Upon the Court's own motion, this matter is reopened and reinstated on the Court's docket. A final order in this case denying the Petitioner's Petition for Writ of Habeas Corpus was entered on September 17, 2004. Thereafter, on September 20, 2004, the court received Petitioner's REPLY IN OPPOSITION TO THE COMMONWEALTH'S MOTION TO DISMISS. Therefore, the Court does vacate its final decision of September 17, 2004, denying the Petition for Writ of Habeas Corpus in order to consider the argument

made by the petitioner in his motion to dismiss.

Petitioner argues that the statute of limitations should not apply to him simply because e chose to proceed with a federal habeas corpus petition rather than proceed with a state habeas corpus petition in a timely manner. The petitioner argues "equitable tolling' of the statute of limitations, citing numerous federal cases. The federal cases cited by the Petitioner deal with the construction of a federal statute. In Virginia, "statutes of limitations are strictly enforced and exceptions thereto are narrowly construed. Consequently, a statute should be applied unless the General assembly clearly crates an exception, and any doubt must be resolved in favor of the enforcement of the statute." Finnerty v. Thornton Hall, Inc. 42 Va. App. 628, 640 (2004). For the Court to allow equitable tolling or to estop the Commonwealth from asserting the statute of limitations, "a claimant must show by clear, precise and unequivocal

evidence that he relied to his detriment upon an act of statement of the other party to refrain from taking action within the statutory periods." Id. At 640-641. In this case there is no detrimental reliance. The running of the statute of limitations occurred because, according the Petitioner, he not understand the law. "[I]gnorance of the law is no excuse, and everyone is conclusively presumed to know the law – that is, he is estopped from denying such knowledge . . ." King v. Empire Collieried Company, 148 Va. 585, 590 (1927). See also Shea v. Virginia, State Bar Disciplinary Board, 236 Va. 442, 444 (1988).

Accordingly, for the reasons set forth in its original order of September 17, 2004, and in this order, the Court again denies the Petitioner's Petition for Writ of Habeas Corpus, and the September 17, 2004, order is hereby reinstated.

And the Clerk of this Court is ORDERED to certify a copy of this order to each counsel of record and to the

Petitioner.

And nothing further remaining to be done this cause, the same is ORDERED stricken form the docket of this Court.

Enter: This 21st day of September, 2004

s Robert Doherty Jr.
Judge

A copy teste Brendan S. Hamilton
Clerk
By: s_____
Deputy Clerk

Appendix F: Virginia Supreme Court Denies Appeal on Habeas Corpus Petition, 04/06/05

VIRGINIA

***In the Supreme Court of Virginia held at the Supreme court building in the City of Richmond on* Wednesday *the* 6th *day of* April, 2005.**

Clarence Jay Lynch
Appellant,

Against: Record No. 042847
Circuit Court No. CL04-604

Gene Johnson, Director, Virginia
Department of Corrections,
Appellee.

From the Circuit Court of the
City of Roanoke

Upon review of the record in the case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

Patricia L. Harrington, Clerk
By: /s/ _____
Deputy Clerk

Appendix G: Second § 2254 Petition
Denied 09/30/05

IN THE UNITED STATES DISTRICT COURT FOR TIIE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

CLARENCE JAY LYNCH, Petitioner,	Civil Action No. 7:05-cv-00480
v.	**DISMISSAL ORDER**
GENE .IOHNSON, Respondent.	By: Hon. Jackson L. Kiser Senior United States District Judge

The petitioner, Clarence Jay Lynch, a Virginia inmate proceeding pro se, filed this action as a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. However, court records indicate that tile petitioner previously filed a § 2254 petition challenging the same conviction, Civil Action No. 7:03-cv-00230. Therefore, the petitioner's current petition is a subsequent one, falling under the provisions of the amendments to federal habeas statutes regarding subsequent or successive petitions. See Title I, Antiterrorism and

Effective Death Penalty Act of 1996, Pub. L. No. 104- 132, 1 10 Stat. 1214 (1996). Pursuant to these amendments, this court may consider a second or successive § 2254 petition only upon specific certification from the United States Court of Appeals for the Fourth Circuit that the claims in the petition meet certain criteria. See 28 U.S.C. § 2244(b).

Because the petitioner has not submitted any evidence of such certification by the Fourth Circuit, it is now

ORDERED

that the petition shall be and hereby is **DISMISSED** without prejudice as successive

The petitioner is hereby advised of the procedure for obtaining certification from the United States Court of Appeals for the Fourth Circuit to have this court review a successive § 2254 petition. The petitioner must submit a copy of a successive § 2254 petition to the Fourth Circuit along with a motion requesting a three-judge panel certification that the district court may review the successive

petition. See 28 U.S.C. § 2244(b). A Fourth Circuit form and instructions for filing this motion will be included with this notice and are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St., Richmond, VA 23219.

The Clerk is directed to send certified copies of the order to the petitioner and counsel of record for the respondent, if known.

ENTER: This 30th day of September, 2005

/s/_____
Senior United Stated District Judge

Appendix H: Appeal and Application to proceed with a Second or Successive Petition Denied by Fourth Circuit Court of Appeals
Part –1-

UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT

FILED
April 20, 2006

No. 06-394

In Re: CI,ARENCE JAY LYNCH

Movant

ORDER

Movant has filed a motion pursuant to 28 U.S.C. Section 2244 for authorization to file a successive application for relief.

The Court denies the motion.

Entered at the direction of Judge Duncan with the concurrence of Judge Wilkinson and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

_____

CLERK

Appendix H: Appeal and Application to proceed with a Second or Successive Petition Denied by Fourth Circuit Court of Appeals
Part –2-

JUDGMENT

FILED: April 27, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No.05-7815
CA-05-480

CLARENCE JAY LYNCH

Petitioner - Appellant

v.

GENE JOHNSON, Director Virginia Department of

Corrections Respondent – Appellee

Appeal from the United States District Court for the Western District of Virginia at Roanoke

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-7815

CLARENCE JAY LYNCH,
Petitioner - Appellant,

versus

GENE JOHNSON, Director Virginia Department of Corrections,
Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. (CA-05-480)

Submitted: April 7, 2006 Decided: April 27, 2006

Before WILKINSON, TRAXLER, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Clarence Jay Lynch, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Clarence Jay Lynch seeks to appeal the district court's order dismissing as successive his petition filed under 28 U.S.C. § 2254 (2000).* An appeal may not be taken from the final order in a habeas proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1) (2000). A certificate of appealability will not issue for claims addressed by a district court absent Ua substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). We have

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*Although the notice of appeal was filed more than thirty days after the district court's decision, the appeal is deemed timely because there was no separate document reflecting the entry of judgment, as required by Fed. R. Civ. P. 58. See Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 835 (4th Cir. 1987)

independently reviewed the record and conclude that Lynch has not made the requisite showing. Accordingly~ we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED